

Motion Ex. 28

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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|--|---|---------------------------------|
| BP AMOCO CHEMICAL COMPANY, |) | |
| |) | |
| Plaintiff/Counter-Defendant, |) | |
| |) | Consolidated Case No. 05 C 5661 |
| v. |) | |
| |) | Judge Amy J. St. Eve |
| FLINT HILLS RESOURCES LLC, |) | |
| |) | |
| Defendant/Counter-Plaintiff. |) | |
| <hr style="border: 0.5px solid black;"/> | | |
| FLINT HILLS RESOURCES LLC, |) | |
| Third-Party Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| BP CORPORATION NORTH AMERICA INC., |) | |
| Defendant. |) | |
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**MOTION OF BP AMOCO CHEMICAL COMPANY AND
BP CORPORATION NORTH AMERICA INC. FOR A STATUS CONFERENCE TO
DISCUSS THE APPROPRIATE RELIEF NECESSARY IN LIGHT OF FHR’S
SUPPLEMENTARY PRODUCTION LAST WEEK OF AN ADDITIONAL 48,000+
PAGES OF DOCUMENTS AND 4 DVDS CONTAINING 249 VIDEO SEGMENTS OF
THE JOLIET PLANT**

Prior to the case’s reassignment to this Court, Judge Moran granted several extensions of fact discovery and continuances of the trial date, over FHR’s objection, due to FHR’s revisions to its damages claims and its ongoing production of documents. On April 2, 2007, FHR told the Court that its document production in response to BP Amoco’s discovery would be done by May 1, 2007. That turned out not to be the case. Thus, Judge Moran set a new fact discovery cut-off of April 30, 2008, with a trial date of October 14, 2008. The fact discovery cut-off was later extended by one month, to May 31, 2008.

Again, those dates had to be moved, after FHR produced over 212,000 documents in May and June 2008 despite the May 31, 2008 fact discovery deadline. In response, on July 16, 2008, and following FHR’s post-discovery production of 212,000 documents and its service of a revised Claim Chart increasing its alleged damages by \$48 million, BP Amoco Chemical

Company (“BP Amoco”) and BP Corporation North America Inc. (“BPCNA”) filed a motion to extend fact discovery on damages issues and extend the trial date or, in the alternative, to preclude FHR’s damages claims. (Dkt. Nos. 195-96) At the hearing on that motion, FHR told Judge Moran that “[w]e believe we have finished our document production.” (Ex. 14) Again, over FHR’s objections, Judge Moran extended fact discovery on FHR’s damages claims by four months. However, Judge Moran declined BP Amoco’s request to preclude FHR’s damages claims due to FHR’s late production of documents.

This case is now set for trial on September 8, 2009. Fact and expert discovery have long been completed, summary judgment and *Daubert* motions have been briefed, and the parties’ trial exhibits are due on July 1, 2009. But last week, on Wednesday, May 13, 2009, FHR produced to BP Amoco (i) 11,761 electronic documents (such as email strings, Excel files, Word documents, photographs, etc.); (ii) 3,554 scanned hard-copy documents; (iii) 4 DVDs, consisting of 249 videotape segments which appear to show maintenance and repairs to the Joliet Plant’s equipment; and (iv) 7 monthly financial reports for the Joliet Plant. All told, the newly produced documents consist of approximately 48,875 printed pages, filling approximately 18 boxes.¹

These are not newly created materials. According to the metadata, approximately 10,816 of the 11,761 electronic documents (92%) were created on or before December 31, 2008, and 4,818 (41%) of the electronic documents were created before the July 16, 2008 hearing. The previously unproduced video segments (contained on 4 DVDs) were created between July 27, 2008 and October 10, 2008. The earliest of the financial reports is for the month of August 2008. Of the 3,554 hard-copy documents, approximately 2,723 documents include date information. Of those 2,723 hard-copy documents, approximately 2,622 (96%) are dated on or before December 31, 2008, and approximately 1,114 (41%) are dated before the July 16, 2008 hearing.

In addition, after fact discovery and all but one expert deposition had been completed, on February 13, 2009 FHR partially supplemented its interrogatory responses, revising its alleged cost-of-repair damages for 31 of its remaining claims, and in the process increasing its total cost-

¹ By filing this motion, BP Amoco is not suggesting that FHR’s counsel is at fault for the discovery conduct at issue.

of-repair damages allegedly incurred to date for the remaining claims by \$14 million.² These revisions, which FHR also made well after BP Amoco took a Rule 30(b)(6) deposition of FHR on damages issues in 2008, raise significant new questions about the nature, extent and evidentiary support for FHR's damages claims. Accordingly, BP Amoco reminded FHR of its affirmative obligation to fully supplement its interrogatory response and set forth the reasons and support for the revisions, and to produce a Rule 30(b)(6) witness to testify about its revised damages claims. But FHR continues to refuse to answer any questions about its revised damages claims, instead informing BP Amoco that the support for its revised damages claims is located in the 48,000+ pages of documents it produced last week.

BP Amoco has been prejudiced by the timing, nature and extent of FHR's post-discovery document production, upon which FHR's revisions to its damages claims apparently are based. The discovery requests to which FHR has now supplemented its responses with the production of 48,000+ pages of documents were served by BP Amoco in late 2005, and thus those requests have been outstanding since the start of the case. Accordingly, BP Amoco requests a status conference and/or briefing schedule to address and enter the appropriate relief necessary under the circumstances. In this regard, the following options would appear to be available to the Court, among others:

- Do nothing and allow FHR to use the newly produced documents in support of its revised Claim Chart and for other purposes, including liability issues. This approach, we submit, would not cure the prejudice to BP Amoco, and would allow FHR to take unfair advantage of the discovery process.
- Extend the trial date and reopen fact and expert discovery. While this in theory might result in curing some of the prejudice to BP Amoco, such an approach would be

² FHR also dropped some claims altogether. This motion is not complaining about the timeliness of FHR's dropping certain claims. But as to the increases and decreases in the alleged damages for 31 of the remaining claims, BP Amoco does not in many cases know the basis for FHR's revised damages claims. In discovery and in preparation for trial, BP Amoco and its experts focused on demonstrating and proving that the then-current damages claims had certain problems and defects, were not supported by or were contrary to the produced documents, etc. Now, all of that prior discovery and preparation may prove irrelevant or of minimal value. Given the significant nature of the changes to the alleged damages for many of the individual claims, whether BP Amoco's prior work and analysis is still relevant, or whether an entirely new damages analysis for certain claims is necessary, is unknown, because until last week various underlying documents relating to the revised damages claims apparently had not been produced by FHR.

extremely expensive and unfair to the Court and BP Amoco. Thus, BP Amoco is not in favor of this approach. Moreover, the Court's deadlines must mean something, and the trial date has already had to have been continued several times due to FHR's same document discovery conduct.

- Require FHR to pay for the additional costs incurred by BP Amoco for having to review and analyze these newly produced documents. While this would not cure the prejudice resulting from FHR's late production, it would ameliorate the unnecessary costs that FHR's late production already has caused and will continue to cause.
- Bar FHR's use of the newly-disclosed evidence and preclude FHR from calling at trial any witness from whose files the documents were produced. This would be appropriate as one element of an overall remedy, but such an approach still would be unfair to BP Amoco and would not cure the prejudice. BP Amoco has been deprived of discovery into, and its experts' use of, the newly produced materials. Moreover, simply barring FHR's use of the documents would still allow FHR to assert its newly revised and increased damages claims for various pieces of equipment.
- Give the jury an adverse inference instruction concerning FHR's discovery conduct. This would not cure the prejudice to BP Amoco, but would be appropriate as one element of an overall remedy.
- Bar FHR's fraud claims. This would cure part of the prejudice to BP Amoco, but would not address FHR's breach-of-contract claims.
- Bar FHR from seeking any of the \$14.1 million in increased cost-of-repair damages for its remaining claims, as alleged in its revised Claim Chart dated February 13, 2009. This remedy would be consistent with the Federal Rules of Civil Procedure and case law refusing to allow a party to increase its damages claim after the close of discovery, because allowing such an increase would be "palpably unfair and prejudicial" to the party against which the claim is asserted. But again, this would not cure the overall prejudice, as the documents produced last week go to issues far beyond damages. BP Amoco has been deprived of discovery into these documents, and its experts have been deprived of their use.
- Bar FHR from seeking any damages. This remedy would be appropriate and tailored to FHR's failure to timely produce damages documents and revise its damages claims, but would not address liability issues.
- Bar FHR's claims in their entirety. Such a result would be appropriate and justified here, as the authorities have held in other cases.
- Enter some combination of the relief outlined above. In addition, there is undoubtedly other relief the Court could consider and order to address FHR's late production of documents and the prejudice it has caused. What BP Amoco has outlined above are simply various suggested options the Court might wish to consider.

At this late stage of the case, the sheer *magnitude* of the number of documents FHR produced last week is arresting. Moreover, the *nature* of the materials produced last week, dating back a year or more in many cases, is difficult to understand. In this regard, (i) FHR produced its privilege log in August 2008, after the creation of many of the documents first produced last week; (ii) the documents FHR produced last week are from various sources, and the files of many FHR employees; (iii) FHR apparently relied upon various of the documents it produced last week in preparing its revised February 13, 2009 Claim Chart; (iv) FHR previously in this case produced video segments, establishing that FHR knew it had videos and that it was obligated to produce them; and (v) the existence of the additional videos produced last week, and what their existence implies, makes last week's production of another 240+ video segments difficult to comprehend. Someone had to direct a person to be at a particular location in order to take video of specific pieces of equipment at the Joliet Plant at specific times on particular days; the person who requested the videos had to know in advance of the need to be at a specific location; the videographer had to be instructed as to what to record; and then someone had to match the video clips to a particular FHR claim or piece of equipment at issue in this case. Finally, FHR has a sophisticated in-house Law Department. As the Court will recall from the briefing on BP Amoco's spoliation motion, FHR contends that it had litigation holds in place and collected documents from throughout the company at various times. Given these basic facts, it is not understandable how nearly 50,000 pages of additional, dated material could only be produced now, on the eve of the Final Pretrial Order and trial date.

BP Amoco has noticed this Motion for next Wednesday, May 27, 2009, consistent with this Court's notice requirements and to bring this issue to the Court's attention promptly. Unfortunately, BP Amoco's lead counsel, Richard Godfrey, will be in Eastern Europe next week on a trip that cannot be rescheduled. If the Court would like to hear from the parties on Friday, May 22, 2009, or defer this motion until the week of June 1, Mr. Godfrey would be available then. Of course, other counsel for BP Amoco (Scott Fowkes) will otherwise be present on the currently noticed date of May 27 or any other date set by the Court.

Pursuant to Federal Rule of Civil Procedure 37(a)(1) and Local Rule 37.2, Scott W. Fowkes, counsel for BP Amoco attempted in good faith to resolve these issues with Ryan P. Stiles, counsel for FHR, including the correspondence attached as Exhibits 21, 22, 23, 24 and 25, and telephonic conversations on May 14, 15, and 21, 2009. FHR continues to object to further

supplementation of its discovery responses and to producing a Rule 30(b)(6) witness on its revised damages claims, and does not agree to the remedies described above.

Wherefore, BP Amoco Chemical Company and BP Corporation North America Inc. request a special status conference with the Court to discuss the prejudice to BP Amoco and BPCNA under the circumstances, and for the Court then to enter the necessary and appropriate relief as outlined above. In further support of this motion, BP Amoco and BPCNA submit the accompanying Memorandum of Law.

Dated: May 21, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2009, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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